

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**HOWARD I. ROUDYBUSH**

Claimant

VS.

**OLDHAM'S FARM SAUSAGE**

Respondent

Self-Insured

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Docket No. 181,871

**ORDER**

Respondent requested Appeals Board review of the December 24, 1996, Award entered by Administrative Law Judge Bryce D. Benedict.

**APPEARANCES**

Claimant appeared by his attorney, Beth Regier Foerster of Topeka, Kansas. Respondent, a self-insured, appeared by its attorney, Mark E. Kolich of Kansas City, Kansas. There were no other appearances.

**RECORD AND STIPULATIONS**

The Appeals Board has reviewed the record and has adopted the stipulations listed in the Award.

**ISSUES**

- (1) Respondent raised the single issue of nature and extent of claimant's disability.

- (2) Claimant in his brief to the Appeals Board raised the issue of the constitutionality of K.S.A. 44-510d(a)(13) that limits loss of an arm, including the shoulder, to a scheduled injury.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the record and considering the briefs of the parties, the Appeals Board finds as follows:

- (1) The parties stipulated that claimant injured his right shoulder while employed by the respondent on July 8, 1993. The right shoulder injury required repair by orthopedic surgeon, Brett E. Wallace, M.D., who performed acromioplasty and repaired a biceps tendon rupture on July 21, 1993. Claimant, at the time of the regular hearing, had returned to work for the respondent. Although he was performing a different job he was earning the same wage as he was earning pre-injury.

Claimant's attorney referred claimant to Dale E. Darnell, M.D., an orthopedic surgeon, in Kansas City, Missouri, for the purpose of examining the claimant and rendering an opinion concerning the functional impairment of claimant's right upper extremity and shoulder. Dr. Darnell examined the claimant on April 12, 1995. In accordance with the Guides to the Evaluation of Permanent Impairment, Third Edition (Revised), and based on the doctor's background and experience, he arrived at a 22 percent functional impairment of claimant's right upper extremity including his shoulder.

Because the parties could not agree upon a functional impairment rating, Special Administrative Law Judge William F. Morrissey, on January 17, 1996, appointed Sergio Delgado, M.D., as an independent medical examiner to examine claimant and issue an opinion on claimant's functional impairment. Dr. Delgado saw claimant once on March 12, 1996, and opined in accordance with the Guides to the Evaluation of Permanent Impairment, Third Edition (Revised), that claimant's functional impairment due to his right shoulder injury was 11 percent.

The Administrative Law Judge found both physicians' impairment ratings were well thought out and supported by medical evidence. The Administrative Law Judge gave both impairment ratings equal weight and found claimant was entitled to permanent partial general disability benefits based on 16.5 percent functional impairment of claimant's right upper extremity including the shoulder.

Respondent argues that the more credible and appropriate impairment rating is Dr. Delgado's 11 percent because he was the independent medical examiner appointed by the Special Administrative Law Judge. On the other hand, claimant contends that Dr. Darnell's rating of 22 percent is the more appropriate impairment rating because he found more deficits.

After reviewing both Dr. Delgado's and Dr. Darnell's medical reports and the claimant's testimony, the Appeals Board also finds the two examining physicians' ratings should be equally weighed as did the Administrative Law Judge. Therefore, the Appeals Board affirms the Administrative Law Judge's finding that claimant is entitled to permanent partial disability benefits based on 16.5 percent of claimant's right upper extremity including his shoulder.

(2) The claimant further argues that the 1993 amendment to K.S.A. 44-510d(a)(13) is unconstitutional because the statute changed a shoulder injury from a whole body injury figured on the basis of 415 weeks to a scheduled injury figured on the basis of 225 weeks. The Administrative Law Judge found he did not have jurisdiction to consider the constitutionality of a statute. He, therefore, found claimant had sustained a scheduled injury.

The claimant makes the same constitutional argument to the Appeals Board. The Appeals Board has previously held that the constitutionality of a statute will not be addressed by the Appeals Board because administrative agencies are generally not empowered to determine that issue. See Redford v. ANR Freight System, Docket No. 192,613 (Sept. 1996) and cases cited therein. Accordingly, the Appeals Board also finds claimant has sustained a scheduled injury.

The respondent also points out that although the Administrative Law Judge found claimant's injury was a scheduled injury he calculated permanent partial disability benefits in the award on the basis of a whole body injury of 415 weeks instead of 225 weeks. The Appeals Board agrees with the respondent and has modified the Administrative Law Judge's award to that extent.

### **AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Bryce D. Benedict dated December 24, 1996, should be, and is hereby, modified as follows:

**WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR** of the claimant, Howard I. Roudybush, and against the respondent, Oldham's Farm Sausage, a self-insured, for an accidental injury which occurred July 8, 1993, and based upon an average weekly wage of \$354.

Claimant is entitled to 13.14 weeks of temporary total disability compensation at the rate of \$236.01 per week or \$3,101.17, followed by 34.96 weeks of permanent partial disability compensation at \$236.01 per week or \$8,250.91 for a 16.5% permanent partial disability of claimant's right upper extremity including his shoulder making a total award of

\$11,352.08 which is all due and owing and is ordered paid in one lump sum less any amounts previously paid.

All remaining orders of the Administrative Law Judge contained in the Award are adopted by the Appeals Board.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of April 1997.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c:   Beth Regier Foerster, Topeka, KS  
      Mark E. Kolich, Kansas City, KS  
      Bryce D. Benedict, Administrative Law Judge  
      Philip S. Harness, Director